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FROM ION DESIGN 201313 5558

P. 2

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION (DAYTON)

PLAYTEX PRODUCTS, INC., a  
Delaware corporation,

Plaintiff,

v.

THE PROCTOR & GAMBLE  
DISTRIBUTING COMPANY, an Ohio  
corporation,

Defendant,

CASE NO. C-1-02-391

(Hon. Thomas M. Rose)

FIRST EXPERT REPORT  
OF MARIO TURCHI

**I. BACKGROUND**

I have been retained by Playtex Products of Westport, Connecticut, ("Playtex") for the purpose of stating my views as to whether one of its patents, U.S. Patent 4,536,178 (the "178 Patent") is infringed by the recently launched Tampax Pearl Plastic tampon applicator (the "Pearl applicator") developed by Procter & Gamble.

I am currently a principal of ION Design, an award winning product development firm in Edgewater, New Jersey, which I co-founded in 1994. ION has extensive experience designing and engineering new products across a range of consumer, medical, and professional markets. My design direction activities incorporate multidisciplinary skills in product planning, concept exploration, industrial design, applied ergonomics, and mechanical engineering. Over the last ten years I have been honored with over a dozen design awards and I have received numerous U.S. patents for invention. I have directed complete development programs ranging from health care products and medical devices to consumer electronics, equipment, and structural packaging both in the U.S. and Europe. These include insulin delivery devices for Becton Dickinson, ankle braces for Aircast, kids flossers for Johnson & Johnson, tampon applicators for

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DEFENDANT'S  
EXHIBIT

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Playtex, oral irrigators for Teledyne Waterpik, air fresheners for Reckitt Benckiser, digital voice recorders for Dictaphone, VR head mounted display for Saab Avionics, and telephony equipment for AT&T. I have been a member of the Industrial Designers Society of America since 1988. Prior to founding ION Design, I worked for a number of design consultancies in the New York area, including Human Factors Industrial Design, leaving as project manager. I spent twelve years of my youth in Switzerland and am fluent in German.

#### **Awards and Honors**

2001 IDEA Industrial Design Excellence Awards (sponsored by BusinessWeek and IDSA)

- Gold Award for Medical & Scientific Equipment
- Bronze Award for Medical & Scientific Equipment
- Bronze Award for Computer Equipment

2001 I.D. Magazine Annual Design Review

- Honorable Mention Award for Equipment

1999 I.D. Magazine Annual Design Review

- Design Distinction Award for Equipment

1998 Medical Design Excellence Award

- Silver Award for LARA

1998 IDEA Industrial Design Excellence Awards

- Bronze Award for Medical & Scientific Equipment

1997 IDEA Industrial Design Excellence Awards

- Gold Award for Clinical & Diagnostic Equipment
- Bronze Award for Medical & Scientific Equipment

1997 I.D. Magazine Annual Design Review

- Design Distinction Award for Equipment

1995 IDEA Industrial Design Excellence Award

- Consumer Products: Bronze Award
- Medical & Scientific Equipment: Bronze Award
- Medical & Scientific Equipment: Bronze Award

1995 I.D. Magazine Annual Design Review

- Honorable Mention Award for Consumer Products
- Honorable Mention Award for Equipment

1990 IDEA Industrial Design Excellence Awards

- Bronze Award for Design Explorations

1990 ID Magazine Annual Design Review

- Design Distinction Award for Design Explorations

#### **Publications**

Abitare, Appliance Manufacturer, Autotech, Axis/Japan, BusinessWeek, Computer-Aided Engineering, Design, I.D. Magazine of International Design, Innovation, Metropolitan Home, Nasa Tech Briefs, Modern Plastics, Sound and Vision, and Wired.



#### Education

Pratt Institute, Brooklyn, NY, MID 1987

Rhode Island School of Design, Providence RI, BFA 1978

Yale University, New Haven, CT; studied fine arts 1975

## II. SUMMARY

I have been asked to study the '178 patent and state my view as to whether the Pearl applicator developed by Proctor & Gamble infringes claims 1, 2, 3, 9, and 10 of the above referenced patent. After careful review of the patent and examination of several Pearl applicators, it is my opinion that the Tampax Pearl Plastic tampon applicator literally infringes claims 1, 2, 3, 9, and 10 of the '178 patent.

I purchased a box of Pearl Plastic tampon applicators (serial number 2214368401), regular absorbency, at a CVS store in Tenafly, New Jersey, on October 24, 2002. In order to render my opinion, I carefully read the '178 patent, reviewed the file history, and then examined the Pearl Plastic tampon applicator against claim numbers 1, 2, 3, 9, and 10 of the patent. I have also looked at P&G's website at [www.tampaxpearl.com](http://www.tampaxpearl.com). I have not examined any documents produced by P&G in this case, and reserve the right to amend this report in light of any such documents.

This is the first time I have been retained as an expert witness, and I have never before testified at a deposition or a trial. For this assignment, I am being compensated at my standard hourly rate of \$150 per hour. A copy of my CV is attached.

## III. INFRINGEMENT OPINION ANALYSIS

I have quoted claim numbers 1, 2, 3, 9 and 10 individually for the purpose of comparing each claim to my observation of the Pearl applicator. I understand that infringement is evaluated in two steps. The claims must first be construed, and then compared to the product. Having looked at the claim terms, I am able to understand their meaning without the need to resort to any secondary references. That is, they have an ordinary meaning. I have also read the patent specification and prosecution history to determine whether any special meaning was given

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to those terms by the inventors. None was. Accordingly, I have compared the Pearl applicator to the claims as they would be understood in their ordinary meaning. If the Court construes them differently, I reserve the right to amend this report.

#### Claim 1

*"1. A tampon applicator comprising:*

*a tubular barrel adapted to house and carry a tampon therein and a slidable, tubular plunger telescopically engageable with said barrel and operable to push the innermost end of the tampon within the barrel out of the forward end of the barrel into the vagina;"*

The Pearl applicator has a tubular barrel which houses a tampon. It also has a tubular plunger that engages telescopically with the above-mentioned barrel for the purpose of pushing the innermost end of the tampon within the barrel out of the forward end of the barrel into the vagina.

#### Claim 1a

*"said tubular barrel comprising:*

*a) a cylindrical front portion adapted to house said tampon;"*

The Pearl applicator has a cylindrical front portion that is configured to house a tampon.

#### Claim 1b

*"b) a rearward portion adapted to partially house and engage said plunger, said rearward portion of said barrel comprising two diametrically opposed, substantially flattened surfaces; and"*

The Pearl applicator incorporates a rearward portion of the barrel that is adapted to hold and engage a portion of the plunger. The rearward portion of the tubular barrel also incorporates two opposing, substantially flattened surfaces on either side of the barrel.

#### Claim 1c

*"c) a transitional section between said rearward portion and said front portion, said transitional section having a reduced diameter relative to said front portion of said barrel;"*

The Pearl applicator incorporates a transitional section between the rearward portion and the front portion of the barrel. This transitional section has a reduced or tapered diameter relative to the front portion for the barrel.



*"whereby said flattened surfaces and said transition section provide a finger and thumb hold enabling a user to comfortably eject and control the position of said tampon."*

The Pearl applicator has substantially flattened surfaces and a transition section which provide a holding area for the finger and thumb, enabling the user to more comfortably eject and control insertion of the tampon. P&G's website explains that the reason for the grip shape is to make it "easier to hold, enabling you to position the applicator comfortably, gently and effectively."

#### **Claim 2**

*"2. The applicator of claim 1 wherein said transitional section comprises two diametrically opposed, angled shoulder surfaces."*

The Pearl applicator incorporates two diametrically opposed angled shoulder surfaces within the transitional area.

#### **Claim 3**

*"3. The applicator of claim 1 wherein said flattened surfaces comprises a plurality of spaced apart ribs."*

The Pearl applicator has several spaced apart ribs on the flattened surfaces. These ribs are arranged in a curved pattern, in the shape of a proprietary symbol or logo and provide additional grip. Although the claim does not require any purpose for the ribs, the P&G website states that the applicator is "textured on both sides to reduce slipping."

#### **Claim 9**

*"9. The applicator of claim 1 further comprising means for limiting the movement of said plunger through said rearward portion of said barrel."*

The Pearl applicator incorporates a means for limiting the travel of the plunger through the rearward portion of the barrel. This is accomplished by means of a curled lip on either end of the plunger, the same means as described and illustrated in the patent (Fig. 5, feature 44, 44a) which prevents the plunger from disengaging from the rearward portion of the barrel.

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**Claim 10**

*"10. The applicator of claim 9 wherein said limiting means comprises a first curled lip integral with the inner end of said plunger and engageable with said transition portion and a second curled lip integral with the outer end of said plunger and engageable with said rearward portion."*

The Pearl applicator has a plunger which incorporates a curled lip on the inner end of the plunger which engages with the transitional section of the barrel plus a second curled lip on the outer end of the plunger which engages with the rearward portion of the barrel.



Mario A. Turchi

October 30, 2002





**CURRICULUM VITAE, MARIO A. TURCHI**

Mario Turchi co-founded ION Design, LLC in 1994 with partner Steven Bellofatto. He holds a Master's degree in industrial design from Pratt Institute ('87), a Bachelor's in sculpture from Rhode Island School of Design ('78) and studied fine arts at Yale University ('75). A recipient of over a dozen design awards and co-inventor of numerous U.S. patents, his design direction activities incorporate multidisciplinary skills in product planning, concept exploration, industrial design, applied ergonomics, and mechanical engineering. He has directed complete development programs ranging from health care products and medical devices to consumer electronics, equipment, and structural packaging both in the U.S. and Europe. These include insulin delivery devices for Becton Dickinson, ankle braces for Aircast, kids flossers for Johnson & Johnson, femme care products for Playtex, oral irrigators for Teledyne Waterpik, air fresheners for Reckitt Benckiser, digital voice recorders for Dictaphone, VR head mounted display for Saab Avionics, and telephony equipment for AT&T.

Mr. Turchi, who is a member of the Industrial Designers Society of America, has had his designs featured on the pages of Abitare, Appliance Manufacturer, Autotech, Axis/Japan, BusinessWeek, Computer-Aided Engineering, Design, I.D. Magazine of International Design, Innovation, Metropolitan Home, Nasa Tech Briefs, Modern Plastics, Sound and Vision, and Wired. He is also the recipient of numerous design awards from BusinessWeek and the Industrial Designers Society of America, and I.D. Magazine. Prior to co-founding ION Design, Mr. Turchi worked for a number of design consultancies in the New York area, including Human Factors Industrial Design, leaving as project manager. Mr. Turchi spent twelve years of his youth in Switzerland and is fluent in German.